Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment

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The United States observes a profound constitutional commitment to safeguarding expressive freedoms, including speech, press, assembly, petition, and association rights secured under the First Amendment. However, when viewed from a global perspective, the American position of affording near-absolute protection to speech is strongly exceptionalist. Other polities, sharing strong constitutional commitments to respect the freedom of speech, do not view government efforts to regulate speech based on its content or viewpoint as presumptively invalid. In such places, government efforts to shape the marketplace of ideas through regulation are seen as fully consistent with a broader legal commitment to respecting expressive freedom. Two recent books, one by Professor Martin Redish and the other by Professor Timothy Zick, help to shed important light on this conflict between free speech paternalism and free speech exceptionalism. Read in tandem, the books help to explain why the United States approach to defining and protecting freedom of expression constitutes a global anomaly. This Essay argues that free speech exceptionalism in the United States is best understood as a logical outgrowth of broader social, cultural, and historical factors. In particular, United States free speech exceptionalism arises from a longstanding and pervasive distrust of government and its institutions, a form of distrust that simply does not exist in most other nations. These books also illuminate an important, and curious, exception to this general distrust of government speech regulations in the United States: transborder speech. The constitutional protection of speech should not rest on an accident of geography; simply put, distrust of government speech regulations should not end at the water's edge. Accordingly, transborder speech merits greater constitutional solicitude and protection than it generally enjoys at present.

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I. INTRODUCTION

The United States proudly maintains a strongly exceptionalist tradition with respect to the meaning and scope of the First Amendment. Whether one dates this tradition to *New York Times Co. v. Sullivan*[1] or to *Brandenburg v. Ohio*,[2] in the contemporary United States, the government generally lacks power to proscribe speech based on either its content or viewpoint. Criticism of the government enjoys robust protection, and even speech calling for its violent overthrow enjoys constitutional protection absent a clear and present danger of imminent lawlessness.[3]

The Supreme Court has explained that:

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[4]

This rule applies because of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and

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[1] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–71, 283–92 (1964) (holding that the First Amendment protects the publication of all statements, even false ones, about the conduct of public officials, unless the plaintiff in a libel action against a press defendant can establish "actual malice," meaning actual knowledge of falsity or reckless indifference to truth or falsity, by clear and convincing evidence); *see also* Harry Kalven, Jr., *The* New York Times *Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 209 [hereinafter Kalven, Jr., *Central Meaning*] (arguing that the holding in *Sullivan* precludes the enforcement of the doctrine of seditious libel—or anything remotely like it—in the contemporary United States). For a more detailed iteration of Kalven's argument that *Sullivan* represents a fundamental paradigm shift for free speech theory and doctrine, see HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 150–78 (Jamie Kalven ed., 1988).

[2] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (holding that even speech advocating unlawful actions, including calls to violence, is constitutionally protected under the First Amendment, unless the language at issue expressly advocates violence and calls for imminent action, and the unlawful action is highly likely to occur). For an overview and discussion of *Brandenburg*, see S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond* Brandenburg, 41 WM. & MARY L. REV. 1159, 1191–97 (2000).

[3] *See Brandenburg*, 395 U.S. at 447.

[4] *Id.*

that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[5]

In the wider world, however, this absolutist approach does not garner much support.[6] In many democratic polities, such as Canada and Germany, the government enjoys discretion to regulate speech in order to promote other constitutional values including human dignity, equality, and multiculturalism.[7] In other words, a meaningful commitment to protecting expressive freedom does not inevitably preclude the government from defining and punishing demonstrably false speech, such as Holocaust denial.[8] In these places, government paternalism—protecting the citizenry from demonstrably false speech and bad ideas—is not deemed fundamentally inconsistent with a serious and robust commitment to expressive freedom.

We find then two competing traditions: one of free speech paternalism, on the one hand, and one of free speech absolutism, or exceptionalism, on the other. If viewed from a global perspective, free speech paternalism enjoys considerably wider and broader support than does the United States exceptionalist—or absolutist—approach.[9] Even in the United States, however, the question of whether free speech absolutism constitutes the best possible course remains the subject of an active, ongoing, and quite lively debate. For example, prominent legal academics, such as Jeremy Waldron and Richard Delgado, have mounted sustained arguments in favor of the federal courts moving existing domestic free speech law, theory, and practice toward existing European and Canadian baselines.[10]

Consider a particularly salient example: in the summer of 2014, the United States Senate actively considered a proposed constitutional amendment that would validate the adoption of federal limits on campaign contributions and

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[5] *Sullivan*, 376 U.S. at 270.

[6] *See* JEREMY WALDRON, THE HARM IN HATE SPEECH 8–17, 39–41, 147–50 (2012); *see also* Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1523–24, 1541–54 (2003) (discussing the ubiquity of hate speech regulations in nations outside the United States, including Canada, Germany, and the United Kingdom).

[7] *See* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 26–28, 51–52, 93–104 (2006).

[8] *Id.* at 126–27 (discussing the German criminal laws proscribing Holocaust denial and the Federal Constitutional Court's decision sustaining these speech restrictions against a constitutional challenge under Article 5 of the Basic Law for the Federal Republic of Germany, Germany's analogue to the First Amendment).

[9] *See supra* note 6 and accompanying text.

[10] *See* RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT 56−59 (1997); WALDRON, *supra* note 6, at 8−12. Waldron emphasizes that his "point is not to condemn or reinterpret the U.S. constitutional provisions, but to consider whether American free-speech jurisprudence has really come to terms with the best that can be said for hate speech regulations." *Id.* at 11. At the same time however, he seems remarkably sympathetic to such speech regulations. *See id.* at 1−17, 34−103.

expenditures and also authorize state governments to adopt such measures.[11] This proposed amendment is plainly aimed at overturning the Supreme Court's decisions on campaign finance regulations. Beginning with *Buckley v. Valeo* and continuing through *Citizens United v. Federal Election Commission*, the Supreme Court has held that money equals speech, and accordingly, limits on uncoordinated campaign expenditures violate the Free Speech Clause of the First Amendment.[12]

This proposed campaign finance reform amendment reflects a fundamental disagreement with the free speech orthodoxy represented by *Sullivan* and *Brandenburg*. Rather than an unregulated marketplace of political ideas, its proponents wish to empower the federal and state governments to regulate political campaign spending, and by implication, political speech itself.[13]

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[11] S.J. Res. 19, 113th Cong. § 1 (2014) (providing that, if the amendment is ratified, "Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections"); *id.* § 2 (providing that, if the amendment is ratified, "Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections"). The "Democracy for All Amendment" had forty-eight co-sponsors in the Senate (all members of the Democratic caucus). *See* Matea Gold, *Proposed Constitutional Amendment to Rein in Campaign Spending Fails in Senate*, WASH. POST (Sept. 11, 2014), http://www.washingtonpost.com/blogs/post-politics/wp/2014/09/11/proposed-constitutional-amendment-to-rein-in-campaign-spending-fails-in-senate/, *archived at* http://perma.cc/A3NY-T5VX; *see also S.J. Res. 19 – A Joint Resolution Proposing an Amendment to the Constitution of the United States Relating to Contributions and Expenditures Intended to Affect Elections*, CONGRESS.GOV, http://beta.congress.gov/bill/113th-congress/senate-joint-resolution/19/cosponsors (last visited Feb. 28, 2015), *archived at* http://perma.cc/8VFB-JYW7. Admittedly, the proposed amendment's prospects for *ever* securing two-thirds support in the Senate, let alone in the House, are rather dim. In fact, on September 11, 2014, the Senate failed to invoke cloture on the amendment, thereby preventing a vote on the merits. *See* Gold, *supra*; *see also Here's How Members of Congress Voted on Major Issues Last Week, as Reported by Voterama in Congress*, WASH. POST, Sept. 14, 2014, at T3 (reporting the 54–42 cloture vote and explaining that "[t]he Senate failed to reach the 60 votes needed to end GOP blockage of a proposed constitutional amendment (SJ Res 19) that would restore broad congressional and state powers to regulate money in politics"). The relevant point is that most members of the Democratic caucus in the Senate have publicly proposed using the constitutional amendment process to override *Citizens United* and the free speech orthodoxy that this decision represents. *See id.*

[12] *See* Citizens United v. FEC, 558 U.S. 310, 319 (2010); Buckley v. Valeo, 424 U.S. 1, 143–44 (1976) (per curiam).

[13] *See* Martin H. Redish & Peter B. Siegal, *Constitutional Adjudication, Free Expression, and the Fashionable Art of Corporation Bashing*, 91 TEX. L. REV. 1447, 1471–72 (2013) (reviewing TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA (2012)) (arguing that the identity of the speaker does not prefigure the value or utility of speech to a potential reader or listener and, accordingly, that corporate political speech should enjoy full and equal status with non-corporate political speech under the First Amendment). As Redish and Siegal cogently argue, "[i]f the electorate is not to be trusted to make choices on the basis of free and open

Although the amendment ultimately did not pass the Senate by the required two-thirds margin,[14] it is nevertheless telling that such a proposed amendment garnered substantial support.[15]

Thus, the question of how best to reconcile a robust free speech tradition with other important constitutional values, such as equality and dignity,[16] remains both important and pressing. In two new books, Professor Martin Redish and Professor Timothy Zick have developed extended arguments about the proper scope and meaning of the Free Speech Clause of the First Amendment that shed helpful light on these issues.[17] Although one might initially conclude that these works have little to say to each other, a more sustained and considered analysis reveals that they actually do speak to common themes and problems. In particular, read together, the books help to elucidate whether political speech should enjoy constitutional protection

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debate, it logically matters not at all who the speaker is." *Id.* at 1472. Moreover, "[i]f the people are incapable of being trusted to make rational choices on the basis of free and open debate and therefore must be aided by selective—and paternalistic—governmental suppression, the inevitable conclusion must be that the entire democratic process cannot be trusted." *Id.*

[14] Gold, *supra* note 11. *See* U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .").

[15] *See* Ramsey Cox, *Senate GOP Blocks Constitutional Amendment on Campaign Spending*, THE HILL (Sept. 11, 2014, 2:19 PM), http://thehill.com/blogs/floor-action/senate/217449-senate-republicans-block-constitutional-amendment-on-campaign, *archived at* http://perma.cc/UP2K-VAYM (reporting that "Senate Democrats needed 60 votes to end debate on the measure, but fell short in the 54–42 party-line vote" and, accordingly, could not invoke cloture and hold a vote on the amendment itself). Even though the Senate could not muster the sixty votes needed to end debate and vote directly on the proposed amendment, the Senate voted overwhelmingly in favor of opening debate on the measure. *See id.* ("Earlier this week, more than 20 Republicans voted with Democrats in a 79–18 vote to advance the amendment in order to force Democrats to spend the week debating the merits of the measure.").

[16] *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence."); *id.* at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.").

[17] *See generally* MARTIN H. REDISH, THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY (2013); TIMOTHY ZICK, THE COSMOPOLITAN FIRST AMENDMENT: PROTECTING TRANSBORDER EXPRESSIVE AND RELIGIOUS LIBERTIES (2014).

regardless of its social cost. In addition, the books bring into clearer focus what I believe to be one of the central cultural bulwarks of free speech exceptionalism in the United States: A pervasive distrust of government and its institutions.[18]

Read in tandem, Redish and Zick help to explain the exceptionalist approach to defining and protecting the freedom of speech under the First Amendment.[19] At the same time, however, they also call needed attention to a curious blind spot in this otherwise robust jurisprudence, namely the protection of transborder speech and the application of First Amendment principles to speech and expressive activity that occurs outside the United States.[20] Our skepticism about the dangers associated with a censorial government should not be limited to government efforts to censor speech and speakers at home but should instead logically extend to efforts to fence out both speech and speakers that the government fears or dislikes.[21] Both Redish and Zick propound theories of free expression that would logically point to greater levels of constitutional protection for transborder speech. Transborder speech is an important, but somewhat neglected, area of First Amendment theory and practice.[22]

This Review Essay proceeds in three parts. Part II considers Redish's sustained argument for an "adversarial" model of the First Amendment. Starting with many of the first principles of the civic republican free speech tradition, Redish sharply breaks with this tradition in arguing that a theory of free speech premised on the project of democratic self-government must be highly catholic in defining the scope of protected expression, essentially leaving all individual speakers free to compete for influence and support.[23] His argument essentially redeploys the democratic self-government theory of freedom of speech, perhaps most famously associated with Alexander Meiklejohn, in the service of a robust and uninhibited marketplace of ideas.[24]

Part III considers Zick's sustained argument for a more cosmopolitan First Amendment—one that would take greater account of foreign constitutional free speech regimes and also consider more systematically and carefully the constitutional protection afforded transborder speech activity.[25] Zick mounts a thoughtful and highly nuanced argument in favor of a more cosmopolitan—and less parochial—vision for the First Amendment.[26]

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[18] *See infra* Part IV.

[19] *See* REDISH, *supra* note 17, at 160–81; ZICK, *supra* note 17, at 41–3, 11–18 74–75, 305–11.

[20] *See* REDISH, *supra* note 17, at 171–75; ZICK, *supra* note 17, at 91–97.

[21] *See infra* Part III.

[22] *See infra* Part III.

[23] *See* REDISH, *supra* note 17, at 27–31, 171–75.

[24] *See id.* at 3–4, 179–81.

[25] *See* ZICK, *supra* note 17, at 70–76, 156, 215.

[26] *Id.* at 1–3.

Finally, Part IV explores important points of conflict and tangent between the authors' visions of free speech theory and practice. Zick's first proposal, greater global consensus on the meaning and effect of a constitutional commitment to expressive freedom, rests in considerable tension with Redish's robust arguments for an uninhibited and wide-open marketplace of ideas. However, Zick's arguments for greater protection of transborder speech seem fully consonant with Redish's model of a First Amendment jurisprudence premised on the primacy of individual agency—the freedom of each and every individual to speak or listen free and clear of either government nudges[27] or dictates.[28]

II. THE ADVERSARY FIRST AMENDMENT AND THE CIVIC REPUBLICAN FREE SPEECH TRADITION

Martin Redish has long advocated a broad vision of the First Amendment.[29] In particular, he has argued consistently and cogently against high-minded government efforts to regulate the marketplace of ideas.[30] Simply put, Redish is an insistent and fierce opponent of any and all forms of governmental free speech paternalism.[31] In other words, Redish opposes the notion that government can improve the marketplace of ideas through regulation that restricts or prohibits so-called low value speech; in this vein, Redish resists both regulation of viewpoints, such as anti-democratic or racist speech, as well as content, such as commercial speech and pornography.[32] As

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[27] *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

[28] *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 20–21, 68–75 (1993). Sunstein forcefully argues that "the current system of free expression is nothing to celebrate" because it "makes it difficult for many views, especially dissenting views from the right or the left, to get a serious hearing at all." *Id.* at 23. Sunstein suggests that the state should play a much more active role in shaping—if not directing—the marketplace of ideas. *See id.* at 34 (positing that "[w]e should not be reflexively opposed to 'government regulation'" of speech because "[s]peaker autonomy, made possible as it is by law, may not promote constitutional purposes.").

[29] *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593–94 (1982).

[30] *See id.* at 616–19.

[31] *See* REDISH, *supra* note 17, 171–72, 179.

[32] *Cf.* PIETY, *supra* note 13, at 60–83, 107–20 (advocating government "paternalism" to protect consumers from false or misleading commercial speech). Professor Redish and his co-author Peter Siegel have described Professor Piety's pro-paternalism arguments as representing little more than "a paradigmatic illustration of viewpoint discrimination—a mode of analysis universally shunned in First Amendment doctrine and theory." Redish & Siegal, *supra* note 13, at 1463–64. They observe that "Professor Piety effectively employs corporate speech as a surrogate for all of the sociopolitical views which she detests." *Id.* at 1464. Accordingly, although Redish and Siegal "appreciate [Piety's] candor and admire the fervency of her moral beliefs," they nevertheless "categorically reject the viewpoint-based nature of her constitutional argument." *Id.* Piety embraces paternalism as a justifiable

an illustrative example, Redish helped to pioneer the arguments later adopted by the Supreme Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*[33] to convey significant constitutional protection on commercial speech.[34] Since then, he has consistently argued for a broad commitment to reading and applying the First Amendment to protect the autonomy of both individual citizens and groups to speak and listen as they wish.[35]

In his new book, *The Adversary First Amendment*, Redish posits an "adversarial" model of the First Amendment.[36] He embraces the Meiklejohn tradition of relating the Free Speech Clause to the project of democratic self-government but emphatically breaks with many adherents of this approach (such as Harry Kalven, Jr., and more recently, Cass Sunstein).[37] Redish argues that speech is integral to the project of democratic self-government, but he infers from this first the premise that speakers and listeners must be able to

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government posture vis-à-vis speech, and she does so with real brio. She explains that, in her view, individual citizens often lack sufficient cognitive ability to sort wheat from chaff in the marketplace of ideas; accordingly, government interventions in speech markets are both necessary and constitutional. *See* PIETY, *supra* note 13, at 82–85, 119–24 (arguing that because "human beings' capacity for rational behavior is subject to significant limitations," which may be characterized as a form of limited or "bounded rationality," it necessarily follows that government regulation of corporate speech, up to and including flat bans, should be deemed constitutionally acceptable). *But see* Redish & Siegal, *supra* note 13, at 1471 ("Of course, if one embraces, rather than rejects, the notion of governmental paternalism as grounds for regulating speech, then one would refuse to deem viewpoint-selective governmental behavior constitutionally troublesome. Professor Piety appears to do just that."). In sum, under Piety's paternalistic approach to assessing the constitutionality of speech regulations, "[n]ot all externally imposed limits on choice interfere with autonomy or are inherently illegitimate." PIETY, *supra* note 13, at 83; *see* SUNSTEIN, *supra* note 28, at 51 (arguing that "when the legal creation of a market has harmful consequences for free expression—and it sometimes does—then it must be reevaluated in light of free speech principles" and positing that "[i]f our Madisonian goal is to produce attention to public issues, and exposure to diverse views, a market system may well be inadequate.").

[33] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561–62, 566 (1980) (holding that commercial speech enjoys significant First Amendment protection and providing a four-part test that reviewing courts should use to determine whether government regulations of commercial speech are constitutional).

[34] *See* Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 431 (1971); *see also* Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 69–71 (2007).

[35] *See, e.g.*, Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 119–21, 136 (1981).

[36] *See* REDISH, *supra* note 17, at 3–5, 176–81.

[37] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) [hereinafter MEIKLEJOHN, FREE SPEECH]; *see also* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); Kalven, Jr., *Central Meaning*, *supra* note 1, at 210–13.

speak and listen free and clear of government efforts to control—or even shape—speech preferences.[38]

By way of contrast, most adherents of the democratic self-government justification for protecting speech relate it to collective community aspirations such as widespread participation in government and the pursuit of common goods.[39] This tradition relates to a broader theory of "civic republicanism," a concept most ably and recently elucidated by Cass Sunstein.[40] In broad terms, civic republicans argue that James Madison sought to create a government in which engaged citizens would actively superintend the government.[41] As Sunstein puts it, the Framers "created an ambitious system of 'government by discussion,' in which outcomes would be reached through broad public deliberation."[42] Thus, he generally rejects the "'marketplace of ideas'—a deregulated economic market"[43] paradigm for framing free expression in favor of "a system of democratic deliberation."[44]

Consistent with these views, Sunstein believes that contemporary free speech jurisprudence is grossly overprotective of low value speech and therefore a problem in need of a solution.[45] He complains that current free speech theory and practice "safeguards speech that has little or no connection with democratic aspirations and that produces serious social harm."[46] He posits that contemporary free speech doctrine embraces an unpersuasive "rhetoric of absolutism" and "refuses to engage in sensible and salutary balancing."[47] Sunstein urges instead an approach that embraces the notion "that government has reasonably broad power to regulate (among other things) commercial speech, libelous speech, scientific speech with potential military applications, speech that invades privacy, disclosure of the name of rape victims, and certain forms of pornography and hate speech."[48] In sum,

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[38] *See* REDISH, *supra* note 17, at 27–31, 169–81.

[39] SUNSTEIN, *supra* note 28, at xix.

[40] *See id.* at 19–23; *see also* CASS R. SUNSTEIN, REPUBLIC.COM 37–50 (2001).

[41] *See* SUNSTEIN, *supra* note 28, at 20–21, 43, 50–51.

[42] *Id.* at xvi.

[43] *Id.* at xviii; *see id.* at 43 (advocating more government regulation of speech because "[s]ome regulatory efforts, superimposed on regulation through current legal rules, may promote free speech" of an appropriately Madisonian cast).

[44] *Id.* at xviii.

[45] *See id.* at 21 ("It may seem controversial or strange to say that there is a problem for the Madisonian system if people do not seek serious coverage of serious issues."); *id.* at 50–51 (arguing against ostensibly "neutral" market-based approaches to regulating speech because "[t]his form of neutrality actually ensures that some will be unable to speak or be heard at all, and at the same time, that others will be permitted to dominate expressive outlets").

[46] SUNSTEIN, *supra* note 28, at xviii.

[47] *Id.*

[48] *Id.*

government speech regulations designed to enhance "the principle of popular sovereignty" should be deemed fully consistent with the First Amendment.[49]

From Redish's perspective, to characterize freedom of speech as a "problem" for a democracy—as Sunstein has done—constitutes a total non sequitur.[50] As Redish explains, "my concern here has been with those theorists who, while committed to democracy in its broad outlines, advocate a collectivist or communitarian form of the theory that is designed to foster pursuit of 'the public interest' or 'the common good.'"[51]

Redish argues that

> [e]ven at its worst, a First Amendment grounded in principles of adversary democracy is far preferable to a logically flawed or deceptively manipulative appeal to democratic and expressive theories grounded in some vague notion of the pursuit of 'the common good' as a basis for the selective suppression of unpopular ideas.[52]

Thus, Redish seeks to orient free speech as an essential condition for democratic self-government but to decouple this commitment to any particular substantive outcomes.[53] He argues that "[f]ree speech theorists are correct in

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[49] *See id.* at xviii–xix; *see also id.* at xix ("We should not reflexively invoke 'the freedom of speech' in order to invalidate reforms that would serve Madisonian goals."). At first blush, Sunstein's approach to the First Amendment appears to draw heavily on Alexander Meiklejohn's democratic self-government theory of free speech; like Sunstein, Meiklejohn argues that government interventions in speech markets are not fundamentally inconsistent with a meaningful commitment to freedom of expression. *See* MEIKLEJOHN, FREE SPEECH, *supra* note 37, at 16–19. As Meiklejohn states the point, "[t]he First Amendment, then, is not the guardian of unregulated talkativeness." *Id.* at 25; *see id.* at 94 (arguing that the First Amendment should protect only speech that "bears, directly or indirectly, upon issues with which voters have to deal."). However, Meiklejohn consistently and forcefully rejects the idea that government has general authority to decide for its citizens what they should—and should not—read, hear, or see. *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 262 ("Here, as elsewhere, the authority of citizens to decide what they shall write and, more fundamental, what they shall read and see, has not been delegated to any of the subordinate branches of government."). Thus, unlike Sunstein, Meiklejohn believes that each and every citizen has the right to determine "for himself to whom he will listen, whom he will read, what portrayal of the human scene he finds worthy of his attention." *Id.* In contrast, Sunstein clearly endorses a much broader regulatory role for the state in shaping, if not controlling, the marketplace of ideas. *See* SUNSTEIN, *supra* note 28, at xvi–xx, 18–23, 34–35, 43, 48–51.

[50] REDISH, *supra* note 17, at 179; *see* SUNSTEIN, *supra* note 28, at xviii–xx, 7–11, 17−23.

[51] REDISH, *supra* note 17, at 179. To be clear, Sunstein, like Redish, relates his overall theory of freedom of speech to the project of democratic self-government. *See* SUNSTEIN, *supra* note 28, at xx ("Ultimately, I argue that many of our free speech disputes should be resolved with reference to the Madisonian claim that the First Amendment is associated above all with democratic self-government.").

[52] REDISH, *supra* note 17, at 181.

[53] *See id.* at 27.

positing a symbiotic intersection between democracy and free expression[,]" but the logical conclusion from this premise is that "democracy invariably involves an adversarial competition among competing personal, social, or economic interests."[54] Redish is associating himself with the free speech tradition of Justice Oliver Wendell Holmes, Jr., who famously argued that even speech "fraught with death"[55] must be protected if the United States is to stay true to its democratic first principles.

Sunstein, by way of contrast, argues that a Madisonian, civic republican understanding of the First Amendment "*must reflect broad and deep attention to public issues*."[56] He emphasizes that "[i]f many or most people are without information, or if they do not attend to public issues, the Madisonian system cannot get off the ground."[57] From this vantage point, "[i]t also follows that serious issues must be covered in a serious way" and "the mere availability of such coverage may not be enough if few citizens take advantage of it, and if most viewers and readers are content with programming and news accounts that do not deal well or in depth with public issues."[58]

Working from these initial premises, Sunstein argues that government has a responsibility—a duty, in fact—to regulate speech comprehensively in order to ensure that the citizenry is capable of performing its governmental oversight duties effectively.[59] As he puts it, "what seems to be government regulation of speech might, in some circumstances, promote free speech as understood through the democratic conception associated with both Madison and Brandeis."[60] Thus, government speech regulations aimed at promoting these values "should not be treated as a constitutionally impermissible abridgement at all."[61]

Redish finds this line of reasoning both highly problematic and also deeply unpersuasive.[62] In his view, civic republican theories of free speech, which require a connection between speech and good government, "incoherently exclude[] speech from the First Amendment's scope despite the fact that it directly facilitates democracy . . . ."[63] Redish posits that individual speakers and listeners must be free to decide for themselves what speech possesses value and what speech does not.[64] In the end, a coherent theory of freedom of

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[54] *Id.*

[55] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see infra* note 139 (discussing and quoting Justice Holmes's iconic *Abrams* dissent in greater detail).

[56] SUNSTEIN, *supra* note 28, at 20 (emphasis in original).

[57] *Id.*

[58] *Id.*

[59] *See id.* at 17–52.

[60] *Id.* at 35.

[61] *Id.*

[62] *See* REDISH, *supra* note 17, at 27–31, 171–76, 181.

[63] *Id.* at 31.

[64] *See id.* at 3–5, 176–81.

expression must "leave[] to the individual speaker the decision of whether to pursue whatever concerns she seeks to advance in a cooperative or confrontational manner."[65]

Redish's adversarial theory of the First Amendment has tremendous explanatory force and justifies the broad protection afforded to speech with (at best) marginal social value, such as racist and homophobic speech, false speech about public officials, public figures, and persons involved in matters of public concern, commercial speech, and pornography.[66] His approach makes absolutely no normative or utilitarian claims about the social value of speech; instead, Redish embraces a process-based theory of speech that justifies its protection because it is an essential component in the recipe for maintaining a functioning democratic polity.[67] Democracy does not imply any particular outcomes, but rather a free and fair chance to make your best case to your fellow citizens; nothing more, and nothing less.[68] From this vantage point, an adversarial marketplace of ideas is something to be celebrated rather than feared.

I would argue that, on a broader level, our adversarial attitude toward government—and also perhaps each other—reflects in part our tradition of pervasive distrust of government.[69] I previously have observed that "[t]he United States, to this day, features a skepticism towards government and governmental institutions that is not widely shared in other nations."[70] Along similar lines, Professor Garry Wills acerbically has posited that "[i]nefficiency is to be our safeguard against despotism" and suggested that our attitude and governing institutions reflect the notion that "a government unable to do much of anything will be unable to oppress us."[71] Thus, rather than viewing

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[65] *Id.* at 176.

[66] *See id.* at 176–81.

[67] *See id.*

[68] *See, e.g.*, *Australian Capital Television Party Ltd. & New South Wales v Commonwealth* [1992] 177 CLR 106, 136–42, 146–47, 212 (Austl.) (holding that, although the Australian Constitution lacks an express textual guarantee of freedom of speech, freedom of speech nevertheless enjoys constitutional protection as an "implied freedom" because "so far as free elections are an indispensable feature of a [democratic] society . . . it necessarily entails, at the very least, freedom of political discourse"); *Nationwide News Party Ltd. v Wills* [1992] 177 CLR 1, 48 (Austl.) ("Freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege; it is inherent in the idea of a representative democracy."). For a relevant discussion, see generally Arthur Glass, *Freedom of Speech and the Constitution:* Australian Capital Television *and the Application of Constitutional Rights*, 17 SYDNEY L. REV. 29 (1995).

[69] *See* Ronald J. Krotoszynski, Jr., *The Shot (Not) Heard 'Round the World: Reconsidering the Perplexing U.S. Preoccupation with the Separation of Legislative and Executive Powers*, 51 B.C. L. REV. 1, 28–34 (2010).

[70] *Id.* at 28.

[71] GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 319 (1999); *see* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL

government as a force for good—a means of expressing and attaining the community's highest aspirations and collective ambitions—government is instead widely seen as at best inept and at worst corrupt.[72]

This distrust flows from the highly pluralistic nature of our polity and our remarkably broad pluralism.[73] Simply put, the United States is a kind of cultural jambalaya, rather than a melting pot.[74] For any particular group (however constituted or defined), an ever-present risk exists that the reins of government might well rest in the hands of persons deemed, in one respect or another, the "Other."[75] The salient fault lines certainly involve race and ethnicity[76] but are hardly limited to these categories. Competition, and hence distrust, also arise based on religious, linguistic, and urban/rural divisions within our population.[77] Redish's adversarial theory provides a persuasive rationale for why we do not trust government to regulate or prohibit speech that is demonstrably and objectively false.[78]

To be sure, a careful reader will find some potential shortcomings in Redish's theory of an adversarial First Amendment. For example, he does not embrace the full force of his argument or take his premises to their logical

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THEORY, AND LEGAL INSTITUTIONS 40 (1987) ("It could, indeed, be said that the American system of government has even institutionalized its distrust to a considerable degree."). Professors Atiyah and Summers, echoing Wills, observe that "[t]he people distrust all government, so the powers of government are limited, divided, checked, and balanced." *Id.* (footnote omitted).

[72] The Supreme Court has acknowledged that distrust of government serves as the primary animating theory of the First Amendment's Free Speech Clause. *See* Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.").

[73] Krotoszynski, Jr., *supra* note 69, at 31.

[74] *Id.*

[75] *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 60, 60–70 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (arguing that minority groups should be afforded recognition and voice, rather than marginalized and feared, and the ability to express their views, feelings, and beliefs freely and in whatever modality they choose); ELLEN SCHRECKER, THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS 27 (2d ed. 2002) (discussing how fear of "the Other" motivated the Red Scare in the 1950s); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339–44 (1987) (noting how difference and perceived difference can skew social interaction and lead to mistrust and conflict between groups in contemporary United States society).

[76] *See generally* JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY (1984) (presenting a comprehensive overview of historical, sociological, and psychodynamic factors that contribute to racial animus and discussing how this animus affects social dynamics between minority and non-minority groups).

[77] Krotoszynski, Jr., *supra* note 69, at 31–33.

[78] *See* United States v. Alvarez, 132 S. Ct. 2537, 2544–45 (2012) (holding that false speech that does not cause any independent harm is protected under the First Amendment).

conclusions.[79] Although it is certainly true that the Supreme Court generally has rejected government paternalism as a basis for restricting corporate political speech or commercial speech,[80] we still draw important lines and exclude some speech from protection based on a conclusive presumption that regulating (or proscribing) speech falling within a particular category invariably survives constitutional review.[81]

Child pornography, true threats, copyright violations, and securities fraud all clearly involve "speech" and might be valued by at least some speakers and listeners; however, we categorically exclude these kinds of speech from the scope of the First Amendment.[82] Thus, our commitment to an adversarial First Amendment will inevitably involve the adoption and enforcement of some content-based restrictions on speech. At some level, we all will embrace government interventions in the marketplace of ideas in order to promote important (compelling) government interests. In this sense, then, the question is not whether paternalism is a legitimate posture but rather the appropriate metes and bounds of government paternalism in the marketplace of ideas.

Redish argues, persuasively, that in the context of political discourse related to the project of democratic self-government, paternalism is simply antithetical to the very idea of democracy itself.[83] But, this does not answer the broader question of how far to take the anti-paternalism principle. Plainly, government regulations aimed at preventing and punishing fraud and true threats relate to sufficiently compelling government interests—interests sufficiently unrelated to government efforts to censor speech based on ideological or political antipathy—to be safely walled off outside the metes and bounds of the First Amendment.[84]

It also bears noting that in many important contexts, we do not rely on the market to sort things out free and clear of government regulation. The Food and Drug Administration requires strict testing and empirical proof of the efficacy of drugs designed and sold as suitable for affecting a structure or function of the body.[85] Few persons—even committed libertarians—would

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[79] REDISH, *supra* note 17, at 167–71 (noting that fraud involves speech but that such speech should be "unprotected"). In other words, Redish accepts at least some categorical exclusions of particularly socially harmful speech as fundamentally consistent with an adversarial model of the First Amendment. *See id.* at 167–75.

[80] *See* Citizens United v. FEC, 558 U.S. 310, 341 (2010) ("We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.").

[81] *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768–75, 1784–88 (2004).

[82] *See* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 236 (2001); *see also* Schauer, *supra* note 81, at 1766–68.

[83] *See* REDISH, *supra* note 17, at 176–81.

[84] *See* Schauer, *supra* note 81, at 1766–68, 1777–84.

[85] *See* 21 U.S.C. § 321(g) (2012) (providing the definition of a "drug" subject to the FDA's regulatory powers); Margaret Gilhooley, *Constitutionalizing Food and Drug Law*,

advocate an unregulated drug market in which manufacturers of patent medicines would be free to make any and all assertions about the efficacy of their products (whether or not they happen to be true). Redish's adversarial First Amendment would not render the FDA's drug testing and efficacy protocols unconstitutional;[86] in this respect then, even he accepts that at some point, the social cost of speech justifies regulation (including even proscription).[87]

Redish's larger point—that the best rationale for protecting speech involves an adversarial marketplace of ideas associated with the process of democratic self-government—has great persuasive force.[88] Moreover, the kinds of categorical exclusions that I have set forth seem quite far removed from the core concern that a government empowered to censor speech would systematically use this power to advance its own electoral interests (and advantage). In general, we permit the social cost of speech regulation to be taken into account only after we have determined that the speech at issue is only marginally related to the process of democratic self-government and that the danger of government censorship based on the content or viewpoint of the speech is remote.[89]

III. THE COSMOPOLITAN FIRST AMENDMENT AND THE PROBLEM OF TRANSBORDER SPEECH

Timothy Zick has written cogently on the importance of place and space to the advancement of core First Amendment values.[90] His recent work has considered the salience of the First Amendment outside the United States.[91]

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74 TUL. L. REV. 815, 859–62 (2000) (discussing FDA regulations regarding effectiveness claims for medical products); Lars Noah & Barbara A. Noah, *A Drug by Any Other Name . . . ?: Paradoxes in Dietary Supplement Risk Regulation*, 17 STAN. L. & POL'Y REV. 165, 165–68 (2006) (discussing the FDA's role in regulating medical and nonmedical products).

[86] *See* REDISH, *supra* note 17, at 167–75.

[87] *See id.*

[88] *See id.* at 176–81.

[89] *See infra* Part IV.

[90] *See, e.g.*, TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 1–24 (2009) (examining the intersection of space and speech and explaining why the physical space used for expressive activity significantly affects the exercise of First Amendment rights); Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 439–44 (2006) (using expressive principles to examine how courts can better evaluate and value place when interpreting and applying the First Amendment); Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 588 (2006) (advocating the centrality of "spatial tactics and tactical places" to expressive activity and positing that the federal courts should consider the relevance of the location of expressive activity as an important First Amendment value).

[91] *See, e.g.*, Timothy Zick, *Falsely Shouting Fire in a Global Theater: Emerging Complexities of Transborder Expression*, 65 VAND. L. REV. 125, 130–31 (2012) (asserting that traditional First Amendment views and values should be upheld in the global theater);

Zick's new book, *The Cosmopolitan First Amendment*, presents an extended argument in favor of a more "cosmopolitan," or global, understanding of the First Amendment.[92] By this, he means (1) that we should welcome a dialogue with the wider world about the proper scope and meaning of expressive freedom and (2) that the federal courts should more robustly apply the First Amendment to transborder expressive activities.[93]

Zick argues "the First Amendment has a crucially important transborder dimension"[94] and that "[e]xpressive and religious activities routinely traverse and, in the digital era, may even transcend territorial borders."[95] He suggests "it is crucial that, to the extent possible, information be freely shared among the peoples of the world 'without regard to frontiers,'"[96] and accordingly, he seeks "to convince readers that transborder liberties are core rather than peripheral guarantees."[97] Given the wider world's less expansive protections of free speech and the inevitable disputes that will arise due to conflicting systems of speech regulation, these questions will be unavoidable.

Zick advocates greater openness to rethinking the scope and breadth of our free speech exceptionalism and points out that an increasingly globalized marketplace of ideas will force at least some introspection about the appropriate scope of free speech protections.[98] In this regard, he observes that "[i]n an era marked by interconnectivity and global information flow, First Amendment exceptionalism will be challenged as never before."[99]

To be clear, Zick is not necessarily hostile or opposed to existing free speech orthodoxy in the United States.[100] He accepts that "First Amendment provincialism is an attitude or perspective that is deeply ingrained in American culture, politics, and law."[101] He explains that "[his] goal in presenting and defending a cosmopolitan perspective is not to urge significant displacement of, or departure from, First Amendment standards or principles relating to domestic liberties."[102] He straightforwardly acknowledges that United States courts have not been particularly receptive to considering foreign approaches

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Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1544–50 (2010) (discussing the importance of transborder speech and the extraterritorial application of the First Amendment and positing that the First Amendment could be more cosmopolitan without sacrificing core expressive freedoms).

92 *See* ZICK, *supra* note 17, at 2–3.

93 *See id.*

94 *Id.* at 7.

95 *Id.* at 7–8.

96 *Id.* at 156.

97 *Id.* at 62.

98 *See* ZICK, *supra* note 17, at 61–76.

99 *Id.* at 303.

100 *See id.*

101 *Id.* at 76.

102 *Id.* at 61.

to protecting expressive freedoms—even if only to reject them.[103] His point is more limited: the increased frequency of transborder speech is going to give rise to conflict of law issues and problems. And, like it or not, United States judges will have to decide how best to respond to these disagreements.

In the end, Professor Zick's sustained argument for a more cosmopolitan First Amendment will almost certainly come into substantial conflict with Professor Redish's adversarial First Amendment. The contemporary Supreme Court's commitment to vindicating speech at the expense of other social interests has been both broad and deep.

The social value of animal "snuff" films,[104] violent video games,[105] and false claims regarding the receipt of military honors[106] is far from self-evident. Yet, the Supreme Court has declined, repeatedly, to recognize new content-based exceptions to the scope of the First Amendment. Even compelling dignitarian concerns, such as the privacy of the funeral of a deceased member of the United States armed services killed while on active duty abroad, have given way to the imperatives of the First Amendment and the free speech project.[107] On the other hand, speech regulations addressing these kinds of speech are quite commonplace in most liberal democracies.

The contemporary Supreme Court seems unlikely to embrace a "cosmopolitan" First Amendment if doing so would involve significantly reduced levels of protection for core political speech in the United States. To be sure, a broader dialogue about the appropriate scope of expressive freedoms would not necessarily imply that the United States must modify, or even abandon, its strongly exceptionalist approach.[108] Even so, a transnational judicial conversation would seem more likely to produce greater frustration and ill-feelings over the absence of shared constitutional values than newfound common ground about how best to reconcile conflicting constitutional commitments to free speech and human dignity.

Zick also argues that "[w]e ought to treat American citizens' rights to engage in speech, assembly, petition, and press as fully portable."[109] So too "[e]xtending constitutional and statutory protections to cross-border religious free exercise would facilitate the global flow of information, theological and

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[103] *See id.* at 61–76.

[104] *See* United States v. Stevens, 559 U.S. 460, 469–72 (2010) (declining to recognize a new category of unprotected speech for depictions of animal cruelty).

[105] *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2735–39 (2011) (declining to create a new category of unprotected speech for violent images or to extend the obscenity doctrine to encompass such materials).

[106] *See* United States v. Alvarez, 132 S. Ct. 2537, 2547–50 (2012) (invalidating a federal statute criminalizing false speech regarding the receipt of military honors).

[107] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1213, 1217–20 (2011) (invoking and applying the First Amendment to disallow the imposition of state tort law liability for a highly offensive protest targeting a military funeral).

[108] *See* ZICK, *supra* note 17, at 70–76.

[109] *Id.* at 215.

other ideas, and religious materials, and would also protect cross-border charitable activities that are based specifically on faith or religion."[110] Zick believes that core First Amendment values, including our ability to maintain and support the project of democratic self-government, would be significantly advanced by considering more seriously how the ability of people and ideas to cross borders enriches the marketplace of ideas.[111] Zick makes powerful arguments for more thoughtful consideration of the applicability of the First Amendment abroad—both to United States citizens and more generally as a fundamental check on the scope of the federal government's power in any and all contexts.[112]

Nevertheless, existing United States legal doctrine tends to ignore or minimize the importance of transborder speech. For example, in its recent decision in *Holder v. Humanitarian Law Project*,[113] the Supreme Court, ostensibly applying strict scrutiny, easily sustained a ban on speech and association with foreign groups alleged to support terrorism.[114] Although the First Amendment applied to transborder speech in *Humanitarian Law Project*, it seemed to do so only weakly (relative to its strength when applied domestically). Moreover, *Humanitarian Law Project* constitutes only one piece of a broader mosaic.

In the 1970s, the Supreme Court sustained, against a First Amendment challenge, a government policy of denying entry visas to foreign nationals who advocated communism.[115] Ernest E. Mandel, a Belgian citizen, as well as a prominent journalist and Marx scholar, objected to his exclusion from the United States—as did United States citizens who wished to hear him speak in person.

Justice Blackmun, writing for the *Mandel* majority, largely dismissed the free speech objections to Mandel's exclusion from the United States.[116] He explained that "[i]t is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise."[117] Moreover, he added:

> [W]hen the Executive exercises this power [to exclude an alien from the United States] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.[118]

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[110] *Id.* at 241.
[111] *See id.* at 76–100.
[112] *See id.* at 90–100.
[113] Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).
[114] *See id.* at 33–39.
[115] *See* Kleindienst v. Mandel, 408 U.S. 753, 756–57 (1972).
[116] *See id.* at 762–69.
[117] *Id.* at 762.
[118] *Id.* at 770.

In my view, *Mandel* leaves very little doctrinal room for protecting transborder in-person speech if the federal government refuses to admit a particular non-citizen speaker from abroad.[119]

In the 1980s, the Supreme Court reaffirmed its approach in *Mandel*. In *Meese v. Keene*,[120] the Supreme Court upheld a federal statutory labeling requirement for films produced abroad and funded by foreign governments.[121] The statute in question required exhibitors to label the films publically as "political propaganda" distributed by "agents" of "foreign principals."[122] Exhibitors of three Canadian films, addressing the problem of acid rain and the dangers of nuclear war, objected to the forced (pejorative) speech and to being labeled purveyors of "foreign propaganda."[123]

Writing for the *Keene* majority, Justice Stevens did not find anything constitutionally problematic about the mandatory labeling requirement.[124] He observed that "Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda."[125] Justice Stevens suggested counter speech as a means of remedying any potential objections to the compelled speech.[126] Thus, even though "[t]he prospective viewers of the three films at issue may harbor an unreasoning prejudice against arguments that have been identified as

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[119] *Cf. id.* at 772 (Douglas, J., dissenting) ("Thought control is not within the competence of any branch of government. Those who live here may need exposure to the ideas of people of many faiths and many creeds to further their education."); *id.* at 785 (Marshall, J., dissenting) ("Nothing is served—least of all our standing in the international community—by Mandel's exclusion. In blocking his admission, the Government has departed from the basic traditions of our country, its fearless acceptance of free discussion."). In this regard, it bears noting that Professor Alexander Meiklejohn, the principal proponent of the democratic self-government theory of freedom of expression, specifically and strenuously objected to the use of immigration laws to fence out ideas and speakers that the federal government deemed unsuitable for domestic consumption. *See* MEIKLEJOHN, FREE SPEECH, *supra* note 37, at xiii–xiv. Because then-Attorney General Tom C. Clark feared that citizens "will be led astray by opinions which are alien and subversive[,]" he used discretionary authority to prohibit foreigners who espoused the wrong sorts of ideas from entering the United States. *Id.* at xiii. Meiklejohn forcefully argued that accepting such restrictions on freedom of speech "would seem to be an admission that we are intellectually and morally unfit to play our part in what Justice Holmes has called the 'experiment' of self-government." *Id.* at xiv.

[120] Meese v. Keene, 481 U.S. 465 (1987).

[121] *See id.* at 480–85.

[122] *See id.* at 469–72.

[123] *See id.* at 467–69.

[124] *Id.* at 485.

[125] *Id.* at 480.

[126] *See Meese*, 481 U.S. at 481 ("By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech.").

the 'political propaganda' of foreign principals and their agents"[127] the statute would permit the exhibitors "to combat any such bias simply by explaining—before, during, or after the film, or in a wholly separate context—that Canada's interest in the consequences of nuclear war and acid rain does not necessarily undermine the integrity or the persuasiveness of its advocacy."[128] Once again, instead of sensitivity to the importance and value of transborder speech, we see indifference, if not hostility, to it.

In light of cases like *Humanitarian Law Project*, *Keene*, and *Mandel*, the prospects for convincing the Supreme Court to afford transborder speech greater solicitude seem meager. To be clear, I agree with Zick that such speech deserves a full measure of protection under the First Amendment. Existing doctrine, however, seems to cut strongly against this outcome.

In sum, despite the cogency of Zick's arguments in favor of a more global perspective on defining and protecting First Amendment expressive freedoms, I am very skeptical that United States courts will prove receptive to considering and engaging foreign free speech law when deciding First Amendment claims. I also doubt that United States courts will agree to protect transborder speech any more reliably or effectively in the future than they have in the past—even though they should.[129]

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[127] *Id.*

[128] *Id.*

[129] *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419–20 (1948) (holding that Congress enjoys "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization"); *see also* The Chinese Exclusion Case, 130 U.S. 581, 609 (1889) (endorsing the constitutional proposition that Congress enjoys plenary power over immigration and naturalization policies); *cf.* Humanitarian Law Project v. Holder, 561 U.S. 1, 25–40 (2010) (upholding against a First Amendment challenge a federal statutory ban on providing "material support" to entities listed as "foreign terrorist organizations" by the State Department even though the restriction had the effect of proscribing political speech wholly unrelated to any terrorist activities); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 487–92 (1999) (holding that the executive branch may deport aliens even when doing so significantly burdens or even precludes the exercise of First Amendment rights by U.S. citizens); *Meese*, 481 U.S. at 480–85 (upholding a federal statute that required film exhibitors to publically label foreign films produced with government financial support as "foreign propaganda" produced by "agents of foreign countries"); Kleindienst v. Mandel, 408 U.S. 753, 765–70 (1972) (rejecting First Amendment-based objections to the federal government's denial of an entry visa to a noncitizen). In general, the Supreme Court has been remarkably—and consistently—deferential to Congress and the President in the context of transborder regulations affecting both the ability of United States citizens to travel abroad and the ability of non-citizens to come to the United States.

IV. PERVASIVE DISTRUST OF GOVERNMENT AND THE FIRST AMENDMENT: IMPLICATIONS FOR EITHER AN ADVERSARIAL OR A COSMOPOLITAN THEORY OF FREEDOM OF SPEECH

The federal courts' pronounced reticence to borrow from other nations' free speech constitutional jurisprudence is not accidental; free speech exceptionalism in the United States relates to a pervasive and deep-seated mistrust of government.[130] Our jurisprudential commitments to content and viewpoint neutrality are best understood not as indications that we think Holocaust denial or homophobic speech possess social value, but rather as reflecting a baseline that the social cost of any form of government censorship will invariably exceed the social cost of hate speech.[131] In other words, the greater threat comes not from private actions that distort the marketplace of ideas, but rather from state interventions to shape it.[132] In this respect, Redish's enthusiasm for the suzerainty of freedom of speech over other collective goals and aspirations, some of which enjoy a constitutional imprimatur, such as equality, stems from a long-standing and deeply-held belief that government is the problem, not the solution.[133] Citizens have a right to speak and listen free and clear of government efforts to superintend them; government has a legal obligation to recognize the agency of individual citizens and groups regarding the exercise of expressive freedoms.

In other polities, such as Canada and Germany, citizens possess greater faith in the government to regulate speech wisely and fairly.[134] Communitarian theories of free expression do not place much emphasis on prohibiting government from adopting viewpoint and content-based speech regulations.[135] Thus, in Germany, criminalizing the Nazi Party or prohibiting the sale of *Mein Kampf* is not thought to constitute a violation of a meaningful commitment to freedom of expression—or antithetical to the project of democratic self-

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[130] Krotoszynski, Jr., *supra* note 69, at 28–29.

[131] *See* Ronald J. Krotoszynski Jr., *Questioning the Value of Dissent and Free Speech More Generally: American Skepticism of Government and the Protection of Low-Value Speech*, *in* DISSENTING VOICES IN AMERICAN SOCIETY: THE ROLE OF JUDGES, LAWYERS, AND CITIZENS 209, 213–19 (Austin Sarat ed., 2012).

[132] *See id.* at 218–21.

[133] *See* REDISH, *supra* note 17, at 8–16, 177–79.

[134] *See* KROTOSZYNSKI, JR., *supra* note 7, at 51–69 (discussing Canada's commitment to equality and multiculturalism); *id.* at 102–04 (discussing Germany's commitment to the primacy of human dignity as a constitutional value). The same also holds true in the United Kingdom. *See* ATIYAH & SUMMERS, *supra* note 71, at 40 ("[T]he English legal and political machine is a well integrated machine in which the various constituent parts operate with a high degree of trust for each other's functions and role," whereas "the American legal and political machine is to a large extent based on a contrary principle, a principle of *distrust* for other constituent parts.").

[135] *See, e.g.*, KROTOSZYNSKI, JR., *supra* note 7, at 118–30.

government.[136] Nor, in Canada, are restrictions against incitement to racial or religious hatred deemed inconsistent with protecting expressive freedom within the polity.[137] Indeed, even comprehensive regulations of *political speech* are entirely quotidian—in the U.K. for example, it is illegal to purchase issue advertising on broadcast television or radio stations (official political parties excepted, of course).[138]

These speech regulations reflect a greater trust in government to regulate speech to promote other social values—particularly equality and human dignity. The Canadian and European approaches generally will sustain speech regulations designed to equalize speech and equalize speakers, even when this is accomplished by restricting or limiting speech overall. Speech regulations that level speech and speakers down are not presumptively unconstitutional. By way of contrast, United States courts are strongly disinclined to accept the notion that government may select free speech winners and losers; instead, we tend to rely on the marketplace to sort out the wheat from the chaff.[139]

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[136] *See id.* at 118–30 (discussing German laws prohibiting advocacy of Nazi ideology and the distribution of Nazi materials in Germany).

[137] *See* R. v. Keegstra, [1990] 3 S.C.R. 697, 743–46, 756 (Can.); KROTOSZYNSKI, JR., *supra* note 7, at 26–27, 52–64 (discussing the Supreme Court of Canada's endorsement of hate speech regulations and its rejection of *Charter*-based free speech challenges to such regulations).

[138] *See* Animal Defenders Int'l v. United Kingdom, App. No. 48876/08, 57 Eur. H.R. Rep. 21, 35–42 (2013) (upholding against a free speech challenge the U.K.'s ban on political advertisements, which extends to broadcast advertisements related to matters of public policy, such as animal cruelty and industrial farm practices).

[139] Justice Holmes ably expressed these sentiments in his iconic dissent in *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting). He famously argued that:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Id. at 630. In fact, Holmes went so far as to argue that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Id.* Obviously, vigorously protecting speech "fraught with death" constitutes a very robust commitment to safeguarding freedom of expression. *See id.* And, from a European perspective, protecting speech "fraught with death" represents an incredibly unwise, indeed unjustifiable policy. In Europe, given the horrors associated with Nazi-era

Professor Frederick Schauer has observed that Americans distrust speech regulations in some contexts, but are entirely sanguine about speech regulations—including flat bans on some kinds of speech—in others.[140] He argues,

> "Distrust of government" theories, for example, cannot explain why that distrust has not been extended to the SEC, the FTC, the FDA, the Justice Department, or judges managing a trial—all of which involve government officials making content-based decisions about speech, and none of which is now covered by the First Amendment.[141]

In other words, we are not always consistent in our skepticism of government interventions in speech markets.

To be sure, Schauer observes that freedom of speech "while in theory definable both positively and negatively, has in reality developed more negatively—understood to be at its core about protecting against danger rather than about making conditions better."[142] And he acknowledges that distrust of government plays an important role in this dynamic.[143] In general, however, he argues that decisions about coverage and noncoverage of particular speech cannot be attributed to any one factor or even any particular group of factors.[144] Schauer posits that "coverage may often be a function simply of the persistent visibility of First Amendment rhetoric, and noncoverage may conversely be a function of the failure of such rhetoric to take hold."[145] In the end, he suggests that the "magnetism of the First Amendment plays a large role in determining which noncoverage decisions are challenged,"[146] and "ultimately, the most significant factor in determining the shape of the First Amendment may be the ability of advocates to place their First Amendment-sounding claims on the public agenda."[147]

In the United States, freedom of speech relates to a strong form of individual autonomy; both individuals and groups enjoy the freedom to seek relative advantage through the political process. Whatever the outer limits of what Schauer terms "covered speech," universal agreement seems to exist that speech related to politics and self-government lies at the very heart of the First Amendment's project. Viewed from this vantage point, Redish's argument in favor of an adversarial, rather than communitarian, understanding of the free speech project has great resonance—and the ring of truth.[148]

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atrocities, it is generally accepted that speech "fraught with death" should be criminally proscribed. *Id.*; *see* KROTOSZYNSKI, JR., *supra* note 7, at 131.

[140] *See* Schauer, *supra* note 81, at 1786–91.

[141] *Id.* at 1786 (footnote omitted).

[142] *Id.* at 1791.

[143] *Id.*

[144] *See id.* at 1803–07.

[145] *Id.* at 1807.

[146] Schauer, *supra* note 81, at 1807.

[147] *Id.*

[148] *See* REDISH, *supra* note 17, at 122–75.

In the United States, collective or communitarian goals more often than not fall to the imperatives of the content and viewpoint neutrality projects—projects designed to empower the individual citizen against the arrayed power of the state to control or silence her. In contexts where government officials appear to be self-interested in controlling or shaping the course of conversations related to the project of democratic self-government, there is never any serious question about the scope of the First Amendment's coverage—it applies with full and complete force and only the most pressing objectives can justify government censorship of speech.[149] Thus, we could frame contemporary First Amendment jurisprudence as a broad-based anti-censorship project that seeks to limit the ability of the state to regulate or control speech markets in circumstances where we have reason to believe that such regulation would almost certainly be self-interested.

These observations clearly undergird one potential response to Schauer's observations about the United States population's seemingly selective distrust of speech regulations.[150] In contexts such as SEC regulations of stock offerings or FDA drug labeling rules,[151] most people do not see much potential for government officials to manipulate or control core political speech. Hence, we tend either to ignore such restrictions or to define them away as regulations of "conduct" rather than speech. On the other hand, when the government appears to be potentially self-interested, and to be seeking a general power to control or manipulate speech markets, the First Amendment applies robustly and with full legal force.

Virginia v. Black provides a salient example—communicating a true threat of violence may be punished but adhering to a racist ideology may not.[152] Government efforts to control or suppress political ideologies, even if obviously socially harmful, cannot be tolerated because government cannot be trusted to police the metes and bounds of acceptable political discourse.[153] Nor

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[149] *See, e.g.*, Virginia v. Black, 538 U.S. 343, 363 (2003).

[150] *See* Schauer, *supra* note 81, at 1786–87.

[151] *See id.* at 1805–07.

[152] *See Black*, 538 U.S. at 358–63 (holding that Virginia could constitutionally punish cross burnings if they were undertaken with the intent to convey a threat). Justice O'Connor explained that:

> [J]ust as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment.

Id. at 363.

[153] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382–96 (1992) (holding that speech that offends or produces alarm because of its racially discriminatory content may not be criminally proscribed because it constitutes impermissible content and viewpoint discrimination); Keyishian v. Bd. of Regents, 385 U.S. 589, 602–04 (1967) (invalidating a New York statute that prohibited the teaching of Marxism in state colleges and universities

may government seek to establish and enforce mandatory civility norms[154] because "one man's vulgarity is another's lyric."[155] As Justice John Marshall Harlan explains in *Cohen v. California*, if government could adopt mandatory civility regulations, it "might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."[156] In sum, the First Amendment plays an important prophylactic role by forestalling bad outcomes by preventing bad beginnings;[157] its function is as much, if not more, about providing a *structural* safeguard of democratic self-government than it is about securing a *substantive* autonomy interest in expressive freedom.

On the other hand, however, providing a remedy when a person communicates a genuine threat of harm does not seriously implicate the anti-censorship project, and is therefore fully consistent with the First Amendment's requirements. Redish's adversarial vision of the First Amendment incorporates this approach—he does not object to the regulation of speech that has no obvious relationship to democratic self-governance if the means of regulation does not present the risk of government imposing value judgments about the worth of particular speech on the citizenry.[158]

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because "the classroom is peculiarly the 'marketplace of ideas'" and "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection'") (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)); Terminiello v. Chicago, 337 U.S. 1, 3–5 (1949) (holding that the First Amendment protects a racist tirade that provoked a hostile response from community members because "[t]he vitality of civil and political institutions in our society depends on free discussion"). As Justice Scalia notes in *R.A.V.*, "[t]he First Amendment generally prevents government from proscribing speech." *R.A.V.*, 505 U.S. at 382.

[154] *See* Cohen v. California, 403 U.S. 15, 25–26 (1971). In *Cohen*, the Supreme Court held that California could not constitutionally punish the public display of the word "fuck" because "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Id.* at 26; *see also* Hess v. Indiana, 414 U.S. 105, 107–08 (1973) (per curiam) (invalidating a criminal conviction based on Hess's use of opprobrious language to a law enforcement officer because, after *Cohen*, positing that such words are constitutionally unprotected "would not be tenable"). The prophylactic nature of the *Cohen* rule is quite clear: "[W]e think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen*, 403 U.S. at 25. For a discussion of the centrality of *Cohen* to the contemporary free speech project, see generally Ronald J. Krotoszynski, Jr., Cohen v. California*: "Inconsequential" Cases and Larger Principles*, 74 TEX. L. REV. 1251 (1996).

[155] *Cohen*, 403 U.S. at 25.

[156] *Id.* at 26.

[157] *See id.* (observing that "little social benefit" would result "from running the risk of opening the door to such grave results" by permitting government to censor speech in order to promote civility).

[158] *See* REDISH, *supra* note 17, at 27–31, 169–77.

It bears noting that, despite superficial appearances to the contrary, the United States approach reflects a larger theory of equality. Free speech exceptionalism in the United States advances core concerns related to the equality of speakers—but our domestic law reflects a strong commitment to a merely theoretical equality (equality of opportunity) rather than actual equality among speakers and ideas (equality of result).[159] Accordingly, in the United States, there is no such thing as a false idea.[160] Nor can there be too much political speech.[161] As Justice Kennedy explains in *Citizens United*, "[t]he First Amendment protects speech and speaker, and the ideas that flow from each."[162]

False speech enjoys constitutional protection, unless some specific harm can be shown to flow from it.[163] And even speech designed to inflict maximal forms of emotional harm enjoys full and robust protection under the Free Speech Clause.[164] In sum, in the United States, we equalize all speech and all

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[159] *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2825–26 (2011) (rejecting "leveling the playing field" as a permissible government policy in the context of election campaigns and holding that such efforts constitute "a dangerous enterprise" that the First Amendment disallows); Citizens United v. FEC, 558 U.S. 310, 340–41 (2010) (holding that the First Amendment prohibits the government from attempting to equalize speech rights by apportioning the right to speak among speakers and that "political speech must prevail against laws that would suppress it, whether by design or inadvertence").

[160] Gertz v. Robert Welch, Inc. 418 U.S. 323, 339–40 (1974) ("We begin with the common ground. Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

[161] *See Citizens United*, 558 U.S. at 339–41. Writing for the *Citizens United* majority, Justice Kennedy posits that:

> By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.

Id. at 340–41.

[162] *Id.* at 341.

[163] United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012) ("The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.").

[164] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1215–19 (2011) (holding that state tort law may not impose liability on otherwise protected speech because a civil jury finds it to be "outrageous" and positing that imposing liability on this standard risks validating a heckler's veto over unpopular thoughts and ideas); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51–52 (1988) (holding that outrageous speech, designed and intended to inflict serious emotional harm on its subject, is nevertheless fully protected under the First Amendment unless it contains an intentional false statement of fact).

speakers, but our conception of speech equality is largely, if not entirely, theoretical—rather than actual—in nature.

The merely theoretical nature of this equality comes into clear focus when one considers that, as a general matter, government lacks any meaningful authority to promote *de facto equality* among speech and speakers on the ground.[165] Thus, we require *government* to ignore discernable—even obvious and universally accepted—differences in the social value and the social cost of speech not because we truly believe in the literal equality of all speech and all speakers, but rather because speech serves as a kind of structural check on government itself (like other structural checks, such as federalism and the separation of powers doctrine). Pervasive distrust of government and its institutions is the ultimate root cause for this highly counter-factual approach to protecting speech.[166]

The commitment to theoretical equality articulates well—perfectly, in fact—with an adversarial, marketplace of ideas theory of expressive freedom. Government cannot establish the value of speech nor may it attempt to prioritize speech on behalf of citizens.[167] From this vantage point, free speech paternalism violates the first premises of our democratic self-government

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[165] *See Bennett*, 131 S. Ct. at 2826 ("'Leveling the playing field' can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech."). Chief Justice Roberts, writing for the *Bennett* majority, further explained that "[t]he First Amendment embodies our choice as a Nation that, when it comes to such [political] speech, the guiding principle is freedom—the 'unfettered interchange of ideas'—not whatever the State may view as fair." *Id.*

[166] *See* Lyrissa Barnett Lidsky, *Where's the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1095–99 (2008). As Professor Lidsky aptly states the matter, even in the context of demonstrably false speech, "it still seems doubtful that American citizens really want the government to get into the business of sanctioning an official version of history." *Id.* at 1098. Lidsky embraces the distrust thesis: our failure to permit regulation of objectively false speech arises because "[t]he dangers of allowing courts or other government bodies to determine historical truth arguably outweighs the potential harm that Holocaust victims will suffer from official silence." *Id.* at 1099.

[167] *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738–39 (2011) (declining to recognize a new category of unprotected speech based on its violent content or, in the alternative, to expand the scope of the existing obscenity doctrine to reach speech that contains depictions of violence); United States v. Stevens, 559 U.S. 460, 468–74, 481–82 (2010) (refusing to recognize a new category of unprotected speech that would permit government regulation of depictions of animal cruelty without regard to the First Amendment); United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 816–18 (2000) (holding that the federal government may not engage in content-based regulation of speech, even with regard to sexually-explicit speech, because "[t]he citizen is entitled to seek out or reject certain ideas or influences without Government interference or control"); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126–31 (1989) (declining to create a new lenient test for speech regulations designed to protect children from sexually-explicit content, finding instead that non-obscene, but sexually-explicit, dial-a-porn messages enjoy full First Amendment protection and holding that that regulations limiting adult access to such content must be narrowly tailored to achieve a compelling government interest in order to survive constitutional review).

project—the notion that the citizens constrain the government (and not vice versa).

On the other hand, Professor Zick's powerful indictment of our reflexive deference to national security and foreign affairs justifications for limiting the modalities of transborder speech raises a very interesting question. For a people so reflexively hostile to government interventions in speech markets, why are we so trusting when the government tells us that a particular speaker is too dangerous to be permitted in the United States?[168] Or that travel to Cuba, in order to gather information about the relative merits of its government, can be absolutely proscribed in order to promote foreign policy objectives?[169] Zick's most powerful example—the claim by the Obama Administration that it possesses the constitutional authority to execute United States citizens living abroad without any judicial process or review—also seems quite puzzling.[170] We fear a government empowered to regulate violent video games and animal snuff films, but we trust the President to decide unilaterally when to kill a citizen with a targeted drone strike?

In short, Zick's arguments demonstrate quite clearly that we are distrustful of government speech regulations—except when we are not. And, in terms of identifying meaningful threats to democratic self-government, the power to suppress speech based on the speaker's identity strikes at the very heart of the First Amendment. And, yet, Zick demonstrates that speaker-based restrictions exist in the context of immigration and naturalization and also in the context of United States citizens attempting to engage with others in foreign nations.[171]

It is much easier to explain United States free speech exceptionalism regarding hate speech or rules aimed at protecting personal honor and dignity than it is to explain complacency about government censorship efforts that use the accident of geography as a basis for content and viewpoint based speech restrictions. The Supreme Court's decision in *Holder v. Humanitarian Law Project*[172] is particularly objectionable—in this case, Chief Justice Roberts purports to apply strict scrutiny to a content-based regulation of speech that the

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[168] *See* ZICK, *supra* note 17, at 126–31.

[169] *See id.* at 103–07.

[170] *See id.* at 193–95.

[171] *See id.* at 103–63.

[172] Holder v. Humanitarian Law Project, 561 U.S. 1, 33–39 (2010) (applying strict scrutiny to a federal ban on providing "material support" to allegedly terrorist organizations when applied to speech activity but finding that the government's interest in preventing acts of terrorism easily satisfied strict scrutiny). Chief Justice Roberts explained that:

> At bottom, plaintiffs simply disagree with the considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization. That judgment, however, is entitled to significant weight, and we have persuasive evidence before us to sustain it.

Id. at 36.

government alleges could provide "material support" to terrorist organizations.[173] But, the strictness of *Humanitarian Law Project*'s iteration of "strict scrutiny" is a sickly, feeble cousin of the Chief Justice's articulation and application of strict scrutiny in cases involving benign race-conscious government action.[174]

To a large extent, the First Amendment does not protect United States citizens in either receiving directly and in person information from persons or institutions located outside the United States, or in their efforts to travel abroad in order to further interests clearly related to speech, association, assembly, petition, and free exercise. My intuition is that the Supreme Court will not prove any more receptive to applying the First Amendment extraterritorially than it has been to incorporating—or even discussing—free speech doctrine and theory from other industrial democracies.

Moreover, unlike the relative dearth of transnational judicial engagement by United States courts, the cost to the marketplace of ideas associated with permitting government to censor based on the accident of geography is potentially tremendous. If public school students do not check their First Amendment rights at the schoolhouse door,[175] it seems very odd to say that United States citizens shed their First Amendment rights at the nation's borders vis-à-vis the federal government. Parity of logic would require that the First Amendment be applied broadly to check any and all forms of government-sponsored content and viewpoint-based censorship. And, permitting pervasive censorship based on the accident of geography seems fundamentally inconsistent with the warp and weft of First Amendment jurisprudence more generally. Simply put, either the government may be trusted to censor speech to advance important public values or it may not.

Benjamin Franklin once suggested that a willingness to sacrifice liberty for security would likely lead to the loss of both in the end.[176] This observation seems highly relevant to addressing the problem of transborder speech restrictions. Professor Zick's call for greater consideration of how to bring the

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[173] *Id.* at 28.

[174] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). Chief Justice Roberts did not seem much inclined to give the same benefit of the doubt to the local school boards in Louisville, Kentucky and Seattle, Washington regarding the need to maintain racially integrated public schools. *See id.* at 745–48.

[175] *See* Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.").

[176] Franklin wryly observed that "[t]hose who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety." BENJAMIN FRANKLIN, AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA 289 (photo. reprint 1972) (1759)); 6 THE PAPERS OF BENJAMIN FRANKLIN 242 (Leonard W. Labaree et al. eds., 1963).

First Amendment to bear in the context of transborder speech merits serious consideration—not only from legal academics, but also from legislators, executive officers, and judges.

This is precisely the point where Redish's adversarial First Amendment works in tandem with, rather than in opposition to, Zick's cosmopolitan First Amendment. If the correct understanding of the First Amendment requires citizens to be able to make independent and autonomous decisions about the value of speech—as both speakers and listeners—the accident of geography should not provide any basis for a greater censorial power on the part of the state. If, as Redish insists, the identity or motivation of a speaker is wholly irrelevant to the potential value or utility of speech,[177] then surely the location of a speaker is no less irrelevant to a proper constitutional analysis.

In this respect, then, a cosmopolitan First Amendment would embrace the values and underlying theory of an adversarial First Amendment. As Redish explains:

> [I]t is essential to keep in mind that, while cooperative theories logically protect only expression designed to pursue the common good, a theory of free expression derived from precepts of adversary democracy leaves to the individual speaker the choice of whether to be motivated by concerns of selfishness or altruism.[178]

Moreover, such an approach also "leaves to the individual speaker the decision of whether to pursue whatever concerns she seeks to advance in a cooperative or confrontational manner."[179] An adversary theory of free speech "rejects dangerous notions of paternalism that might threaten the individual's ability to protect himself through his speech."[180] In sum, "American democracy involves an ordered form of adversary process, in which citizens must be allowed to determine for themselves what governmental choices will improve their lives or implement values they hold dear and then . . . to persuade others to accept their views."[181]

Zick argues that "[l]ike cross-border mobility, cross-border information flow is a critically important aspect of the First Amendment system of free expression."[182] Consistent with this view, "[u]nder a more cosmopolitan interpretation or perspective it is crucial that, to the extent possible, information be freely shared among the peoples of the world 'without regard to frontiers.'"[183] Zick's cosmopolitan vision of the First Amendment would protect speech, assembly, association, and petition across borders because these activities are essential components of a free flowing marketplace of

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[177] *See* REDISH, *supra* note 17, at 30–34.
[178] *Id.* at 176.
[179] *Id.*
[180] *Id.* at 177.
[181] *Id.* at 3–4.
[182] ZICK, *supra* note 17, at 156.
[183] *Id.*

ideas.[184] As he puts it, such rights should be "fully portable."[185] Thus, Zick ultimately arrives at the same place as Redish regarding the ability of the federal government to censor transborder speech, although he arrives at this conclusion by a different route.

V. CONCLUSION

The First Amendment is exceptional. In the United States, we privilege speech at the expense of other (constitutional) values, including equality, privacy, and dignity. The Justices also have given very short shrift to civic republican arguments that content and viewpoint-based government speech regulations should be evaluated on a case-by-case basis to determine whether, on balance, they improve the functioning of the marketplace of ideas more than they inhibit it. As a general matter, the Supreme Court has adopted an approach quite consonant with Professor Redish's "adversary" First Amendment, in which all speakers and ideas fight for influence in something of a free-for-all, largely free and clear of government regulation of speech markets.

Thus, notwithstanding Professor Zick's cogent suggestion that the United States should engage the wider world in a dialogue about the proper meaning and scope of expressive freedom, it seems very unlikely that the federal courts will take up this project any time soon. This is so because the European approach to regulating speech reflects a far more trusting attitude toward government efforts to protect citizens from the ill-effects of bad ideas—a policy that Redish rejects out of hand as a kind of ill-advised free speech "paternalism."[186]

In important ways, then, the First Amendment *is* uncosmopolitan—"parochial" even—and this state of affairs is not likely to change. Free speech paternalism has gained little ground in United States free speech jurisprudence and seems unlikely to play a major role going forward. Simply put, free speech paternalism cannot be reconciled with the pervasive distrust of government that generally characterizes the attitude of many United States citizens toward their institutions of government. At bottom, free speech paternalism rests on the willingness of citizens to repose considerable trust in the institutions of government to govern with an even hand—a condition that does not seem to exist in the contemporary United States.

On the other hand, however, our exceptional First Amendment is perhaps not quite as exceptional as it can or should be. In some important contexts, the Supreme Court and lower federal courts have accepted paternalism in the name of national security as a basis for restricting access to both speakers and

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[184] *See id.* at 61–163, 199–262.
[185] *Id.* at 215.
[186] *See id.* at 171–72, 177.

ideas.[187] These policies are antithetical to both Redish's adversarial model and to Zick's cosmopolitan model of the First Amendment. Our willingness to accept these efforts to protect us from "bad ideas" is also strangely puzzling; in a society that generally features broad based and reflexive distrust of government, we too often accept uncritically government efforts to limit access to ideas and concepts deemed inimical to national security or United States foreign policy interests more generally.

If we truly believe in our free speech exceptionalism, then its scope should not end at our borders (as Professor Zick persuasively demonstrates that it presently does in many important respects). The geographic source, and nationality, of speakers and ideas should be deemed entirely irrelevant to their potential relevance to the project of democratic self-government; our jurisprudential and doctrinal antipathy toward free speech paternalism should not evaporate at the water's edge. Whether one reaches this conclusion by embracing a libertarian understanding of the free speech project (Redish) or as part of an effort to generate a more global free speech framework (Zick), both roads lead to the same place. If we actually believe in our stated commitment to the fundamental centrality of free expression to our constitutional order, then we can and should do a better job of living up to our free speech ideals in contexts where doing so could impose serious social costs—notably including in contexts involving transborder expressive activity.

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[187] *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 765–70 (1972).